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No. 03-1579

IN THE

Supreme Court of the United States

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.,
Petitioner,

v.

VERIZON INTERNET SERVICES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF

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PETITIONER'S REPLY MEMORANDUM

I. THE EXCEPTIONAL IMPORTANCE OF THE QUESTION PRESENTED JUSTIFIES REVIEW.

Verizon's brief in opposition misses the point. Chiding the Recording Industry Association of America ("RIAA") for failing to identify a circuit conflict, Verizon urges "continuation of the normal process whereby multiple circuits are encouraged to address a novel legal issue before any intervention by this Court." Opp. at 14. RIAA does not, however, seek review based on a circuit conflict. The petition identifies a federal statutory issue of "exceptional importance" that should be decided by this Court without delay. *See* Pet. at 2, 15-20, 27-29; *see generally* S. Ct. R. 10(c). With respect to the arguments actually advanced in the petition, Verizon has little to say.

First, Verizon all but ignores the fact that the D.C. Circuit's decision conflicts with the interpretation of § 512(h) adopted by the Copyright Office (the views of which warrant deference[1]) and the United States (which is advocating that interpretation in multiple fora). As the United States has explained, the D.C. Circuit's interpretation "fatally compromises" private copyright enforcement against Internet infringers.[2]

The United States has taken this position because the decision below threatens critical *public* interests in fostering expression, and in the protection of the intellectual property

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[1] Verizon is incorrect that the Copyright Office's views are "not entitled to any weight in this Court." Opp. at 25. Although *Chevron* deference may not be appropriate, the Office receives *Skidmore* deference. *E.g.*, *Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 490 (3d Cir. 2003); *Morris v. Business Concepts, Inc.*, 283 F.3d 502, 505-06 (2d Cir. 2002); *see generally Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001).

[2] Br. for United States, *RIAA v. Charter Communications, Inc.*, No. 03-3802, at 16 (8th Cir. filed Feb. 24, 2004).

rights vital to a substantial sector of this nation's economy. The United States' interest in litigating the meaning of § 512(h) distinguishes this case from a garden-variety dispute affecting only private interests. In this respect, this case is like one in which a court of appeals has invalidated a statutory interpretation on which a federal agency has premised its enforcement efforts, a situation in which the Court will grant review absent a circuit conflict. *See, e.g., Albertson's Inc. v. Kirkingburg*, 527 U.S. 551, 562-63 (1999); *Morton v. Ruiz*, 415 U.S. 199, 201-02 (1974).

Second, Verizon has no persuasive response to the point that deferring review would defeat the objectives of § 512. The D.C. Circuit acknowledged that "[t]he stakes are large" here. Pet. App. 16a. Indeed, intellectual property owners are under assault. Every day, millions of ISP subscribers using peer-to-peer ("P2P") technology – "who are ignorant or more commonly disdainful of copyright and in any event discount the likelihood of being sued or prosecuted for copyright infringement," *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003) (Posner, J.), *cert. denied*, 124 S. Ct. 1069 (2004) – continue to make billions of copyrighted works available for unlawful copying. This piracy drains billions of dollars annually from the companies that produce and disseminate copyrighted works and from the artists who create those works. *See* Brief Amicus Curiae of Motion Picture Ass'n of America, *et al.*, at 5-9.

Yet, at the very moment the threat of massive piracy has become a devastating reality, the D.C. Circuit stripped from copyright owners the most important weapon Congress gave them: the ability to respond quickly. As the Copyright Office has explained, "[i]t is common sense that in order to be able to take action against" Internet infringers, copyright owners must learn their identities. Pet. App. 141a. Only an ISP can provide that information, and § 512(h) provides a means for copyright owners to obtain it promptly. The provision requires district court clerks to "expeditiously

issue" subpoenas upon proper requests from copyright owners, § 512(h)(4), requires that such subpoenas "order the service provider . . . to expeditiously disclose" subscriber identities, § 512(h)(3), and requires ISPs to respond "expeditiously" upon receiving a subpoena, § 512(h)(5). By eliminating the possibility of a rapid response to infringement over P2P networks, the D.C. Circuit has blown a huge hole in § 512's protective structure.

The timing of this Court's review should reflect that reality. Where, as here, a court of appeals decides a novel question of statutory interpretation in a way that has drastic consequences for an important sector of the economy (as well as for important public interests), the Court has not hesitated to grant review without a circuit conflict. *E.g.*, *FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293 (2003); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Here, the case for immediate review is even stronger because the ongoing infringement constitutes irreparable harm to copyright owners as a matter of law.

Third, Verizon cannot identify any offsetting benefit that justifies delaying review. Verizon does not dispute that the case involves a pure question of statutory interpretation, that the question presented here will recur frequently, or that the factual situation in which it arises is typical. Thus, this case is an ideal vehicle for resolving the issue.

Finally, it is no answer to say that John Doe lawsuits can protect copyright owners while the "normal process" of litigation proceeds. To the contrary, the inefficacy of pre-existing mechanisms, such as John Doe lawsuits, was the very problem Congress enacted § 512(h) to address. A plaintiff in a John Doe suit has no immediate right to third-party discovery to identify a defendant. Rather, a plaintiff must move for permission, and even conscientious district courts can take weeks to rule on such motions. During that time, millions of additional unlawful copies of a copyrighted

song, movie or software can be made and distributed. It is also quite possible that the ISP will have purged its files of information needed to identify an infringing subscriber (ISPs typically retain such information only for limited periods), making judicial relief impossible.

Moreover, a plethora of John Doe lawsuits drains judicial resources, requiring judges to rule on motions for expedited third-party discovery in hundreds of cases and spawning collateral litigation over the propriety and scope of such discovery. In contrast, § 512(h) avoids such burdens by authorizing court clerks rather than judges to issue pre-litigation subpoenas and limiting the scope of discovery to the identities of infringers. *See* H.R. Rep. No. 105-551(II), at 61 (1998) ("The issuing of the order should be a ministerial function performed quickly for this provision to have its intended effect."). The John Doe approach also eliminates the possibility of pre-litigation settlement between the copyright owner and the infringing ISP subscriber, exacerbating the strain on judicial resources.

The availability of John Doe lawsuits thus provides no basis for delaying review. To the contrary, Verizon's endorsement of such suits highlights the bankruptcy of its substantive arguments. Verizon concedes that disclosure of subscriber identities is permitted in John Doe lawsuits (indeed, its argument depends on that concession, for John Doe suits would be futile without third party discovery of the identities of infringing subscribers). The question is thus not *whether* such disclosure will occur but *how* it will occur: through the streamlined § 512(h) process or through the cumbersome John Doe process. The Congress that enacted § 512 surely intended the former.

Nor is the limited geographic reach of the D.C. Circuit's decision a reason to defer review. Although the ruling technically forecloses subpoena enforcement only in the District of Columbia, its practical effect has been to shut

down the use of § 512(h) nationwide against infringement occurring on P2P systems. Before this case, ISPs consistently responded to § 512(h) subpoenas. Pet. at 10. Now ISPs consistently refuse to do so, invoking the D.C. Circuit's decision and turning every subpoena request into a "test case." The prospect of lengthy test cases in other jurisdictions is cold comfort to copyright owners who continue to suffer massive harm.

In view of these considerations, and because there are strong reasons for concluding that the D.C. Circuit misinterpreted § 512(h) (*see* Pet. at 19-27 and Point II *infra*), this Court should grant review now.

II. THE D.C. CIRCUIT WAS WRONG.

There is no merit to Verizon's contention that the D.C. Circuit's interpretation of § 512(h) was "compelled" by settled "canons of statutory construction." Opp. at 19. Indeed, the opposite is true. The D.C. Circuit gave no weight to the plain text of § 512(h), which expressly applies to all "service providers," including those providing solely conduit functions. Pet. at 20. The D.C. Circuit likewise refused to give the language of § 512(c)(3)(A)'s notification provision its ordinary meaning when the court held that, as a matter of law, an ISP could not "disable access" to infringing material on a subscriber's computer, even though as a matter of plain English an ISP can do so by terminating the subscriber's account. Pet. at 22, 23 n.16. Most fundamentally, the D.C. Circuit made no effort to construe § 512(h) in light of the statute's manifest purposes, Pet. at 23, thereby upending "the balance Congress struck" in this "compromise legislation." *See Thornburg v. Gingles*, 478 U.S. 30, 84 (1986). Had the D.C. Circuit adhered to the normal rules of statutory interpretation, it would have agreed with the district court that § 512(h) applies to all ISP functions.

As demonstrated in the Petition at pp. 19-27, the D.C. Circuit erred in concluding that § 512(h)'s cross-reference to

§ 512(c)(3)(A) was intended to limit an ISP's duty to respond to a subpoena to situations in which an ISP also has a duty to "take down" infringing material on its network. Section 512(c)(3)(A) is a notification device. Congress used it in § 512(h) to establish the bona fides of the copyright owner's claim of infringement and to provide the ISP with the information needed to respond to the subpoena. Read this way, the cross-reference to § 512(c)(3)(A) has content, and is obviously not "congressional gibberish." *See* Opp. at 20. There is simply no reason to infer from the cross-reference that Congress implicitly intended to exempt conduit ISPs from § 512(h), a step Congress could easily have taken directly. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes.").

Verizon's contrary reading of the statute proceeds from the false premise that § 512(h) "incorporates the subsection (c)(3) 'notice *and take down* procedure' at every stage." Opp. at 6. (emphasis added). In truth, § 512(h) incorporates only the notification requirement, not the "take down" requirement – which is set forth in a different provision, § 512(c)(1), that § 512(h) does not cross-reference. By its terms, therefore, the statute does not require an ISP to "take down" material identified in a notification accompanying a § 512(h) subpoena. The "take down" obligation arises independently under § 512(c)(1), and is triggered or not depending on whether all the requirements of § 512(c) are met (including the requirement in § 512(c)(1) that the infringing material be stored on the ISP's network). A notification can thus satisfy the statute for purposes of § 512(h) even if it does not also trigger the "take down" duty of § 512(c)(1). Congress stated this plainly in § 512(h)(5), which obligates an ISP to respond to a subpoena even where

it does not believe it has any duty to "take down" material pursuant to § 512(c)(1).

Verizon thus misleads when it repeatedly asserts that applying § 512(h) to all ISP functions would require ISPs to terminate the accounts of subscribers who store infringing material on their home computers. An ISP's duty to "take down" infringing material is dictated by other provisions of § 512 – not § 512(h) or § 512(c)(3)(A) – and is not altered one iota by a notification and subpoena served pursuant to § 512(h). Thus, there is no basis for Verizon's contention that applying § 512(h) to all ISP functions is inconsistent with congressional intent because it would result in the termination of subscribers' accounts rather than merely the "taking down" of infringing material. Section 512(h) requires an ISP to provide information to the copyright owner, not to take any other action with respect to the infringing material or the infringing subscriber.

More generally, Verizon mischaracterizes the overall structure of § 512 when it claims that "the particular functions service providers are performing drive the application of *all* the service provider duties contained in § 512]," and must therefore dictate the scope of § 512(h) as well. Opp. at 6 (emphasis added). The duties set forth in § 512(i) – which require ISPs to (i) maintain and enforce a policy of terminating subscribers who are repeat infringers, and (ii) refrain from interfering with standard technical measures copyright owners use to protect against digital piracy, § 512(i)(1), apply to *all* ISPs, irrespective of what functions they provide. Making § 512(h) applicable to ISPs providing all functions is thus not the least bit anomalous.

Finally, Verizon fails to rehabilitate the D.C. Circuit's insupportable assertion that "the legislative history of the DMCA betrays no awareness whatsoever that internet users might be able directly to exchange files containing copyrighted works," Pet. App. 14a – a claim the D.C. Circuit

made to justify its suggestion that Congress should solve the problem the decision below created. In reality, Congress enacted § 512 in response to that very risk. P2P software merely provides a more efficient method of doing what BBS software, FTP sites, and e-mail had already made possible long before the DMCA's passage in 1998 – transferring material from one home computer to another without storing it on an ISP's network. That problem was a focus of the legislative process preceding the DMCA's enactment, and the legislative history discusses the risks posed by BBS, FTP and e-mail dissemination of copyrighted works. *See* Pet. at 2-9. Congress cannot plausibly be thought to have ignored this risk in the DMCA, a statute intended to address digital piracy in a comprehensive and enduring manner.[3]

Nor can Verizon explain why a Congress ignorant of the risk of ISP subscribers directly exchanging files containing copyrighted works would have gone to the trouble of enacting statutory provisions that limit the liability of ISPs providing solely conduit functions, § 512(a), and that authorize injunctive relief requiring ISPs providing conduit

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[3] Verizon chides RIAA for citing legislative history from "legislation *other than the DMCA*," Opp. at 24 & n.7 (emphasis in original), but that contention is incorrect. The legislative history to which Verizon referred derived from hearings on the "Online Copyright Liability Limitation Act," the original name of the DMCA, Pet. at 5-7, as well as from a series of hearings held on copyright piracy during a single week in September of 1997, when Congress was considering multiple pieces of legislation, including the DMCA. *See Online Copyright Liability Limitation Act: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (Sept. 16-17, 1997); *Copyright Piracy, and H.R. 2265, The No Electronic Theft (NET) Act: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (Sept. 11, 1997). Indeed, the NET Act, discussed in conjunction with the DMCA, was targeted at infringers who used personal computers to disseminate copyrights works over the Internet without charging for them. Sept. 11, 1997 Hearing at 2 (statement of Chairman Coble) (citing *LaMacchia* case involving an MIT student using a personal computer and FTP software to disseminate copyrighted works).

functions to terminate the accounts of subscribers who directly exchange infringing material without storing it on an ISP's network, § 512(j)(1)(B). The reality is that Congress enacted these provisions precisely because it understood that "internet users might be able directly to exchange files containing copyrighted works." Pet. App. 14a.

Indeed, § 512(j)'s authorization of such injunctive relief is a powerful indicator that Congress intended § 512(h) to cover all ISP functions. A copyright owner could not bring a lawsuit to obtain the injunctive relief authorized by § 512(j)(1)(B) without first ascertaining the identity of the subscriber transmitting infringing material over an ISP's network. Yet only the subscriber's ISP can provide that information. To accept the D.C. Circuit's reading of § 512, therefore, one would have to assume that Congress gave with one hand and took away with the other – *i.e.*, that Congress authorized injunctive relief requiring ISPs to terminate subscribers' accounts even when the ISP has provided only conduit functions, and at the same time denied copyright owners streamlined procedures to obtain the information they need to pursue claims for such injunctive relief. That reading makes no sense.

III. SECTION 512(h) IS CONSTITUTIONAL.

Verizon's constitutional attacks on § 512(h) provide neither a "constitutional avoidance" justification for the D.C. Circuit's decision nor a meritorious alternative ground for affirmance. The doctrine of constitutional avoidance has no principled application here because the alleged infirmities Verizon identifies would apply to the D.C. Circuit's truncated interpretation of § 512(h) just as fully as they would to the interpretation of § 512(h) advanced by petitioners.

In any event, Verizon's constitutional arguments are meritless. RIAA discusses the errors in Verizon's Article III argument in its response to Verizon's conditional cross-

petition. With respect to the First Amendment argument, it suffices to point out that Verizon does not claim its First Amendment rights, or those of the subscribers whose identities RIAA sought, have been infringed. Nor could such a claim be made. Section 512(h) does not forbid, restrain or otherwise abridge any speech. Verizon's First Amendment challenge instead rests on speculation that subscribers other than those whose identities are at issue might refrain from speaking anonymously on the Internet for fear of being wrongly accused of infringement and identified pursuant to § 512(h). That is an overbreadth claim, and Verizon cannot come close to meeting the heavy burden of demonstrating that § 512(h) should be subject to the drastic remedy of facial invalidation – particularly given the procedural protections built into the statute. *See Virginia v. Hicks*, 539 U.S. 113, 123-24 (2003). Moreover, as this Court has repeatedly held, an assertion of First Amendment interests does not limit the enforcement of legal process. *See Univ. of Pa. v. EEOC*, 493 U.S. 182, 199-200 (1990); *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 192-93 (1946).

CONCLUSION

The petition for a writ of certiorari should be granted.

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